Lau Kieng Chung v Public Prosecutor

HIGH COURT (SIBU) — CRIMINAL APPEAL NO 22 OF 1992
STEVE LK SHIM J
28 MAY 1993

Customs and Excise *— Conveying uncustomed goods — Ingredients of offence — Customs Act 1967 s 135(1)(e)*

Customs and Excise *— Conveying uncustomed goods — Prosecution relied on s 119 of the Customs Act 1967 to prove goods were uncustomed — Whether burden of proof shifted to defendant — Customs Act 1967 s 119*

Customs and Excise *— Conveying uncustomed goods — Knowledge of defendant — Rebuttable presumption — Whether accused had rebutted the presumption — Customs Act 1967 s 135(2)*

Customs and Excise *— Conveying uncustomed goods — Whether there was intention to defraud — Customs Act 1967 s 135(1)(e)*

The appellant had been charged and convicted for being knowingly concerned in conveying uncustomed goods with intent to defraud the government of the duties thereon, an offence under s 135(1)(e) of the Customs Act 1967 ('the Act'). He was fined RM50,000, in default, six months' imprisonment. He appealed against both conviction and sentence on the grounds, inter alia, that: (i) the magistrate was wrong in holding that the goods were uncustomed goods; (ii) the magistrate failed to consider whether the appellant had discharged the onus that he had no knowledge that the goods were uncustomed goods; and (iii) the magistrate had erred in finding that there was intention by the appellant to defraud the government.

Held, dismissing the appeal:

(1) The ingredients of the charge under s 135(1)(e) of the Act were, firstly, that the accused was knowingly concerned in conveying uncustomed goods and, secondly, in doing so he had intended to defraud the government. In order to establish the first ingredient, the prosecution must prove that there was a conveyance of the goods by the accused; that at the time of such conveyance, the goods were uncustomed goods; and that the accused knew the goods were uncustomed goods. As for the second element, ie that the goods were uncustomed goods, s 119 does not raise any presumption but merely shifts the burden onto the accused to show that duty had been paid on the goods. As for the third element, the prosecution could invoke the rebuttable presumption in s 135(2) of the Act to prove knowledge.

(2) The prosecution had relied on s 119 of the Act to prove the goods were uncustomed and the appellant had failed to discharge the burden on him by showing that the goods were not imported or

that the duties thereon had been paid. The first ground of appeal was therefore dismissed.

(3) The appellant had failed to rebut the presumption of knowledge raised by s 135(2) of the Act as the magistrate, who had the opportunity of observing the demeanour of the appellant, did not believe his evidence. Therefore the second ground also failed.

(4) It was clear the appellant had deliberately assisted in the evasion of customs duties on the said goods. The amount of goods conveyed was substantial and, as a reasonable man, he would have known that the duty on them would also be substantial. Hence, it was reasonable to conclude that the appellant had intended to defraud the government.

(5) As regards sentence, there was nothing to show that the magistrate had applied the wrong principles nor had she imposed an excessive fine in the circumstances. The appeal against sentence was also dismissed.

[Bahasa Malaysia summary

Perayu telah dituduh dan disabitkan atas kesalahan bahawa beliau, dengan disedari, telah terlibat dalam membawa barang-barang yang tidak dibayar duti kastam dengan niat untuk memfraud kerajaan tentang duti ke atasnya, iaitu suatu kesalahan di bawah s 135(1)(e) Akta Kastam 1967 ('Akta itu'). Beliau telah didenda RM50,000, jika gagal membayar, enam bulan penjara. Perayu telah membuat rayuan terhadap sabitan dan hukuman atas sebab-sebab, antara lain, bahawa: (i) majistret telah tersilap apabila mendapati bahawa barang-barang tersebut tidak dibayar duti kastam; (ii) majistret telah gagal mempertimbangkan sama ada perayu telah menunjukkan bahawa beliau tidak tahu yang barang-barang tersebut tidak dibayar duti kastam; dan (iii) majistret tersilap apabila mendapati bahawa perayu berniat untuk memfraud kerajaan.

Diputuskan, menolak rayuan itu:

(1) Unsur-unsur pertuduhan di bawah s 135(1)(e) Akta itu adalah, pertama, bahawa tertuduh dengan sengaja terlibat dalam membawa barang-barang yang tidak dibayar duti kastam, dan kedua, dalam berbuat demikian beliau telah berniat untuk memfraud kerajaan. Bagi membuktikan unsur pertama itu, pihak pendakwa mestilah membuktikan bahawa terdapat pembawaan barang-barang oleh tertuduh; bahawa pada masa tersebut barang-barang itu merupakan barang-barang yang tidak terbayar duti kastam; dan bahawa tertuduh mengetahui duti kastam ke atas barang-barang itu tidak dijelaskan. Merujuk kepada unsur kedua, iaitu bahawa barang-barang itu tidak terbayar duti kastam, s 119 tidak menimbulkan sebarang anggapan tetapi ianya hanya memindahkan beban membukti kepada tertuduh supaya menunjukkan duti telah dibayar ke atas barang-barang itu. Tentang unsur ketiga, pihak pendakwa boleh menggunakan anggapan boleh patah yang

terkandung di dalam s 135(2) Akta itu untuk membuktikan pengetahuan.

(2) Pihak pendakwa telah bergantung kepada s 119 Akta itu untuk membuktikan bahawa barang-barang itu tidak terbayar duti kastam dan perayu telah gagal untuk menunjukkan bahawa barang-barang itu tidak diimpot atau duti ke atasnya telah dibayar. Oleh itu, alasan rayuan pertama ditolak.

(3) Perayu juga telah gagal mematahkan anggapan pengetahuan yang ditimbulkan oleh s 135(2) Akta itu kerana majistret, yang telah berpeluang melihat tingkah laku perayu, tidak mempercayai keterangan beliau. Oleh itu alasan kedua juga ditolak.

(4) Adalah jelas bahawa perayu telah dengan sengaja menolong dalam pengelakan duti kastam atas barang-barang itu. Kuantiti barang-barang yang dibawa adalah substansial dan beliau, sebagai seorang yang waras, patut mengetahui bahawa duti ke atasnya juga mestilah tinggi. Maka adalah munasabah jika mahkamah merumuskan bahawa perayu mempunyai niat untuk memfraud kerajaan.

(5) Berkaitan dengan hukumannya, tidak ada apa-apa yang menunjukkan bahawa majistret telah memakai prinsip-prinsip yang salah ataupun telah menjatuhkan denda yang terlampau berat dalam keadaan kes ini. Oleh yang demikian, rayuan terhadap hukuman juga ditolak.]

Notes

For cases on the conveyance of uncustomed goods, see 6 *Mallal's Digest* (4th Ed) paras 25, 28–31 and 207–213.

Cases referred to

1 *Yap Yoon Lin v R* [1954] MLJ 59 (folld)
2 *Kee Kim Chooi & Ors v PP* [1952] MLJ 180 (folld)
3 *PP v Fatimah* [1960] MLJ 109 (folld)
4 *Wolfgang Pzetzholdt v PP* [1970] 2 MLJ 199 (refd)
5 *PP v Tay Yew Lia* [1957] MLJ 17 (refd)
6 *PP v Koo Cheh Yew & Anor* [1980] 2 MLJ 235 (refd)
7 *Ng Kim Huat v PP* [1961] 27 MLJ 308 (distd)
8 *PP v Chieng Ung Kai* [1993] 1 MLJ 21 (distd)
9 *Lim Kim Chai v PP* [1963] MLJ 26 (folld)

Legislation referred to

Customs Act 1967 ss 119, 135(1)(e), 135(1)(i), 135(2)

George Lim (*Battenberg & Talma*) for the appellant.
Abdul Rahman bin Sebeli (Deputy Public Prosecutor) for the public prosecutor.

Cur Adv Vult

Steve LK Shim J: This is an appeal by the appellant, Lau Kieng Chung, against the decision of the Magistrates' Court, Sibu, made on 14 November

1991. Thereat, the appellant had been convicted of an offence under s 135(1)(e) of the Customs Act 1967 ('the Act'). He was ordered to pay a fine of RM50,000, in default, six months imprisonment. The charge against him reads as follows:

> That you, at about 3pm on 8 May 1988, at about 6½ mile, Oya Road, Sibu, were knowingly concerned in conveying uncustomed goods, to wit, 383 cartons x 24 cans x 355 ml of 'Carlsberg' beer and 669 cartons x 24 cans x 330 ml of 'Heineken' beer on a truck, plate registration no SD 1518, with intent to defraud the government of the duties thereon, to wit RM34,400.31 and thereby committed an offence under s 135(1)(e) of the Customs Act 1967, and punishable under s 135(1)(i) of the same Act.

Although ten grounds of appeal are propagated in the petition of appeal, Mr George Lim, counsel for the appellant has, at the outset, indicated that for the sake of convenience, he would concentrate his submission upon three propositions, namely, that the learned magistrate was wrong in holding that the goods, the subject matter of the charge, were uncustomed goods, that the learned magistrate had failed to consider whether the appellant had discharged the onus that he had no knowledge that the goods were uncustomed, and that the learned magistrate had erred in finding there was intention to defraud on the part of the appellant. I shall deal with them separately but, before that, I should perhaps consider the ingredients necessary to sustain such a charge in relation to uncustomed goods. They are: (1) that the accused person was knowingly concerned in conveying uncustomed goods; and (2) that in doing so, he had intended to defraud the government. As regards the first ingredient, Spencer Wilkinson J in *Yap Yoon Lin v R*[1] had said, inter alia [at p 61]:

> I think the prosecution must, before conviction, as a part of their case prove that there was a conveying of the goods and that these goods were already uncustomed at the time they were conveyed. In other words the offence or breach which resulted in the good being uncustomed must, I think, be prior in time to the conveying of the goods... In other words, I think the natural meaning of the words 'knowingly concerned in conveying uncustomed goods' is 'being knowingly concerned in conveying goods which one knows, at the time that they are conveyed, to be uncustomed' and not 'concerned in conveying goods which one knows will become uncustomed goods if they are conveyed'.

It seems clear from the above passage, that in order to establish the first ingredient, it is necessary to prove: (a) that there was a conveyance of the goods by the accused person; (b) that at the time of such conveyance, the goods were uncustomed goods ; and (c) that the accused person knew that the goods he conveyed were uncustomed goods. I do not think element (a) presents any difficulty but elements (b) and (c) may give rise to some problems. As regards element (b), the case of *Kee Kim Chooi & Ors v PP*[2] provides sufficient revelation. Therein, Thomson J said, inter alia, [at p 181]:

> As regards the question of whether the tobacco was uncustomed, the prosecution had to prove that it had been brought at sometime from outside Malaya and that

duty had not been paid upon it, and to do so they were entitled to invoke the assistance of s 99 of the Customs Enactment which reads as follows:

> 'If in any prosecution in respect of any goods seized for non-payment of duties or for any other cause of forfeiture or for the recovering of any penalty or penalties under this Enactment, any dispute shall arise as to whether the customs duties have been paid in respect of such goods, or whether the same have been lawfully imported or lawfully landed, or concerning the place whence such goods were brought, then and in every such case the proof thereof shall be on the defendant in such prosecution.'

That section clearly applied for the prosecution was one for penalties under the Enactment and when the appellants claimed trial, as they did, the effect of their so doing was to put in dispute every material allegation in the charges against them including the allegations that the tobacco had been brought from outside Malaya, and that duty had not been paid on it. The effect of s 99, then, was that the proof of their sides of these disputes was upon the appellants, that is to say, they had to satisfy the court either that the tobacco had not been brought from outside Malaya or that the proper duty had been paid upon it.

From the excerpt above, it would appear that the prosecution needs to establish two conditions, namely, that the goods were imported and that duties thereon had not been paid. However, to do this, the prosecution could invoke the assistance of s 99 of the Customs Enactment which is substantially in pari materia with the present s 119 of the Act which has the effect of shifting the burden of proof onto the accused. It should be noted that s 119 can be invoked only as regards matters of dispute specified therein. It does not raise any presumption but merely shifts the burden of proving the matters specified therein. The obligation of the accused under s 115 of the Customs Ordinance 1952, the predecessor of s 119, was described by Hepworth J in *PP v Fatimah*[3] thus [at p 110]:

> No presumption arises under s 115 of the Ordinance. When a person is charged and claims trial a dispute arises. Once a dispute has arisen s 115 says the burden of proof is on the defendant. The defendant may discharge this onus by producing a receipt for the duty or he may know that the duty has been paid and, although unable to produce the receipt, may be able to prove it (see the example of the bottle of whisky in para 4 of the judgment of Good J in *PP v Tay Yew Lia* [1957] MLJ 17).

And Good J, in the cited case, in fact expanded on this by stating that the effect of s 115 of the Customs Act 1952 (the predecessor of s 119) was that if a customs officer found a person in possession of dutiable goods anywhere in the Federation, he could take him to court and make him prove that duty had been paid or make him rebut the presumption of knowledge created by s 131 (now s 135(2)).

This brings us to element (c) which concerns the accused's knowledge that the goods were uncustomed at the time of conveyance. Under s 135(2), such goods are presumed to be uncustomed to the knowledge of the accused unless he proves to the contrary. Section 135(2) stipulates thus:

> In any prosecution under this section or section 139 any dutiable, uncustomed or prohibited goods, shall be deemed to be dutiable, uncustomed or prohibited

> goods, as the case may be, to the knowledge of the defendant unless the contrary be proved by such defendant.

The term 'knowledge' according to Sharma J in *Wolfgang Pzetzholdt v PP*,[4] implies a consciousness of facts and is of greater import than the term 'having reason to believe'. See also *PP v Tay Yew Lia*.[5] In short, the effect of s 135(2) is to provide the essential ingredient of knowledge relevant to the charge and places on the accused the duty to prove otherwise. As Thomson J had said in *Kee Kim Chooi*:[2]

> The effect of that new subsection clearly is that while knowledge that the goods were uncustomed remains an essential ingredient of the offence described by s 114(i)(e), that ingredient is now in the first instance supplied by the law itself and it is for the accused person to displace it if he can.

Quite clearly therefore, the presumption under s 135(2) is a rebuttable one. The accused can rebut this presumption by proof of circumstances from which it is reasonable to infer or conclude, on a balance of probabilities, that he could not possibly have known or acquired the imputed knowledge: see *PP v Koo Cheh Yew & Anor*.[6]

In the instant case, the propositions or grounds advanced by Mr George Lim for the appellant have to be considered in the light of the principles and observations alluded to above. In respect of the first proposition, Mr Lim has contended that the learned magistrate was wrong in holding that the goods specified in the charge were uncustomed goods. In this connection, he seems to submit (and this is also reflected in his submission in the lower court) that it was incumbent on the prosecution to adduce evidence to show that the goods stated in the charge were uncustomed goods. He cites, in support, *Ng Kim Huat v PP*,[7] drawing particular attention to the following passage therein [at p 309]:

> By s 2 'dutiable goods' are 'goods subject to the payment of customs duty and on which such duty has not yet been paid'. By s 10 customs duties may be levied on goods 'imported into or exported from the Federation'. It is thus clear that the same goods may, at different stages of their existence be 'dutiable goods' and goods which are not 'dutiable goods' ... It is only 'dutiable goods' between the moment when it is first imported and the moment on which duty is paid. In other words, before goods on which customs duties have been levied can be described as 'dutiable goods' for the purposes of the Ordinance they must comply with both of two conditions. One is that they must have been imported and the other is that duty must not yet have been paid on them.

I think it should be noted that in the above case, the court was concerned with a charge of carrying dutiable goods in a local craft otherwise than with the permission of the Comptroller of Customs, whereas in our case, the charge relates to being knowingly concerned in conveying uncustomed goods. There, the court was considering the elements which constituted the term 'dutiable goods' but in the instant case, we are concerned with the term 'uncustomed goods'. The facts in *Ng Kim Huat*[7] are therefore distinguishable from this case. In the circumstances, I do not think it is of relevance here. The same must apply to *PP v Chieng Ung Kai*,[8] cited by Mr Lim, a case which relied essentially on the dicta in *Ng Kim Huat*.[7] In any

A event, although the court in *Ng Kim Huat*[7] held that two conditions were required to be established before goods could be described as 'dutiable goods', namely, that the goods were imported and that duties thereon had not been paid, there is nothing therein to indicate or suggest that the prosecution, in proving those conditions, could not rely on the assistance of s 119 of the Act. Indeed, under s 119, the burden of proof on such B conditions has clearly been shifted onto the accused person. For the reasons given, I do not, with respect, accept Mr Lim's contention that the prosecution must, without more, adduce evidence to establish that the relevant goods were uncustomed goods. The burden which has shifted to the accused is sufficiently clear in s 119. He must therefore show either that the goods in C question were not imported or that the duties thereon had been paid. In the instant case, the appellant could not be said to have established either of these. There is not a morsel of evidence by the appellant on this score. In the circumstances and on the evidence, I do not think that the learned magistrate was wrong in holding that the goods specified in the charge were in fact uncustomed goods. Mr Lim's first proposition therefore fails.

D The second proposition raised by Mr Lim, namely, that the learned magistrate had failed to consider whether the appellant had discharged the onus that he had no knowledge that the goods stated in the charge were uncustomed goods now calls for consideration. This relates to the question of whether the appellant knew, at the time of conveyance, that the relevant E goods were uncustomed goods. In view of s 135(2), a presumption would arise that the appellant had knowledge that the goods he conveyed were uncustomed goods unless he could prove the contrary. This, as I have mentioned, is a rebuttable presumption. In this connection, the learned magistrate had said in her judgment:

F > ... and the effect of the presumption under s 135(2) would place the burden of satisfying this court, on the balance of probabilities, on the accused person that he did not know they were uncustomed.
>
> The accused has failed to discharge this burden. The stories that it was not his duty to inquire as to the nature of the goods he was conveying and that he accepted an offer of carriage of goods from two unknown men, without more, do G not hold water, especially taking into account his 20 years experience as a public carrier.

It would seem that as far as the learned magistrate was concerned, the appellant had not be able to rebut the presumption of knowledge. It was quite evident that she did not believe the story of the appellant. On the evidence, I would not be able to say that she was wrong in her assessment, H particularly as she had the opportunity of observing the demeanour of the appellant in the witness stand whereas I have none. In the circumstances, I do not think Mr Lim's proposition aforesaid is sustainable.

I now come to the third and last proposition of Mr Lim, namely, that the learned magistrate had erred in finding there was intention to defraud the I government on the part of the appellant. First, I should refer to *Lim Kim Chai v PP*,[9] wherein Adams J said, inter alia, that 'the question of the intention to defraud remains at all times to be proved by the prosecution in the same way as 'intention' is proved in all criminal cases where guilty

knowledge is one of the ingredients of the offence'. Bearing that in view, what does the evidence show? Here, the learned magistrate has held that the relevant goods were uncustomed and that the appellant knew they were uncustomed goods at the time he conveyed them. If he realized the goods were uncustomed, as a public carrier of some 20 years experience, he should have refused to convey them. Indeed, there was all the more reason for him to refuse if, as he alleged, the goods belonged to some strangers who had not paid the relevant customs duties on the goods. That he did not do so is clear testimony that the appellant had deliberately and positively assisted them in evading customs duties on the goods. Furthermore, the amount of goods he was conveying was quite substantial, consisting of 1,052 cartons of beer and hence, he would, as a reasonable man, have known that the amount of customs duties payable thereon would also be substantial. In fact, the authorities valued the amount to be exactly RM34,400.32. Under the circumstances, it is, I think, reasonable and proper to conclude, as the learned magistrate had done, that the appellant had intended to defraud the government. There is therefore no merit in Mr Lim's last proposition.

For the reasons stated, I will dismiss the appeal against conviction. As regards sentence, it is sufficient for me to say that there is nothing in the record to indicate that the learned magistrate had applied the wrong sentencing principles nor do I think that the amount of fine to be manifestly excessive in all the circumstances. Accordingly, the appeal against sentence is also dismissed.

Appeal dismissed.

Reported by Aslam Zainuddin